

## APPENDIX E

## Standard Protective Order and Declaration Used in Section 628 Program Access Proceedings

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

[Name of Proceeding]

)  
)  
)

CSR No. \_\_\_\_\_

## PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 8.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as “Confidential Information” consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as “Confidential Information” is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE.” Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 6 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed

necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

## Attachment A to Standard Protective Order

## DECLARATION

In the Matter of )

[Name of Proceeding] ) Docket No. \_\_\_\_\_

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) \_\_\_\_\_

(printed name) \_\_\_\_\_

(representing) \_\_\_\_\_

(title) \_\_\_\_\_

(employer) \_\_\_\_\_

(address) \_\_\_\_\_

(phone) \_\_\_\_\_

(date) \_\_\_\_\_

## APPENDIX F

## Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-42 (hereinafter referred to as the *Program Carriage NPRM*).<sup>2</sup> The Commission sought written public comment on the proposals in the *Program Carriage NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act<sup>4</sup> pertaining to carriage of video programming vendors by multichannel video programming distributors (“MVPDs”) intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the “program carriage” rules).<sup>5</sup> As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor’s program service as a condition for carriage (the “financial interest” provision);<sup>6</sup> (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage (the “exclusivity” provision);<sup>7</sup> or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage (the “discrimination” provision).<sup>8</sup> Congress specifically directed the Commission to provide for “expedited review” of these complaints and to provide for appropriate penalties and remedies for any violations.<sup>9</sup> Programming vendors have complained that the Commission’s procedures for addressing program carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42, Notice of Proposed Rule Making, 22 FCC Rcd 11222, 11231-40, Appendix (2007) (“*Program Carriage NPRM*”).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“1992 Cable Act”); see also 47 U.S.C. § 536.

<sup>5</sup> See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, *Second Report and Order*, 9 FCC Rcd 2642 (1993) (“1993 Program Carriage Order”); see also *Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) (“1994 Program Carriage Order”). The Commission’s program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

<sup>6</sup> See 47 C.F.R. § 76.1301(a); see also 47 U.S.C. § 536(a)(1).

<sup>7</sup> See 47 C.F.R. § 76.1301(b); see also 47 U.S.C. § 536(a)(2).

<sup>8</sup> See 47 C.F.R. § 76.1301(c); see also 47 U.S.C. § 536(a)(3).

<sup>9</sup> See 47 U.S.C. § 536(a)(4).

Congress. In the *Second Report and Order* in MB Docket No. 07-42, the Commission takes the following initial steps to improve its procedures for addressing program carriage complaints.

3. First, in response to concerns that programming vendors are uncertain as to what evidence must be provided in a complaint to establish a *prima facie* case of a program carriage violation, the Commission codifies in its rules the evidence required to establish a *prima facie* case.<sup>10</sup> A *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed to a ruling on the merits.<sup>11</sup> The *Second Report and Order* in MB Docket No. 07-42 explains that, in complaints alleging a violation of the exclusivity or financial interest provisions, the complaint must contain direct evidence (either documentary or testimonial) supporting the facts underlying the claim.<sup>12</sup> For complaints alleging a violation of the discrimination provision, however, direct evidence supporting a claim that the defendant MVPD discriminated “on the basis of affiliation or non-affiliation” is sufficient to establish this element of a *prima facie* case but is not required.<sup>13</sup> Because it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants, the *Second Report and Order* in MB Docket No. 07-42 clarifies that a complainant can establish this element of a *prima facie* case of a violation of the program carriage discrimination provision by providing the following circumstantial evidence of discrimination “on the basis of affiliation or non-affiliation”: (i) the complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and (ii) the complaint must contain evidence that the defendant MVPD has treated the video programming provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.<sup>14</sup> In addition, regardless of whether the complainant relies on direct or circumstantial evidence of discrimination “on the basis of affiliation or non-affiliation,” the complaint must also contain evidence that the defendant MVPD’s conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly.<sup>15</sup>

4. Second, having established specific evidentiary requirements for what the complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, the *Second Report and Order* provides the defendant with additional time to answer the complaint in order to develop a full, case-specific response, with supporting evidence, to the evidence put forth by the complainant.<sup>16</sup> Specifically, while the Commission’s current rule provides that an MVPD served with a program carriage complaint shall answer the complaint within 30 days of service, the *Second Report and Order* amends this rule to provide an MVPD with 60 days to answer the complaint.<sup>17</sup>

<sup>10</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 9-17.

<sup>11</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 16.

<sup>12</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 12.

<sup>13</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 13.

<sup>14</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 14.

<sup>15</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 15.

<sup>16</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 18.

<sup>17</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 18.



5. Third, in response to concerns that the unpredictable and sometimes lengthy time frames for Commission action on program carriage complaints have discouraged programming vendors from filing legitimate complaints, the Commission establishes deadlines for action by the Media Bureau and Administrative Law Judges (“ALJ”) when acting on program carriage complaints.<sup>18</sup> Action on program carriage complaints entails a two-step process: the initial *prima facie* determination by the Media Bureau, followed (if necessary) by a decision on the merits by an adjudicator (*i.e.*, either the Media Bureau or an ALJ).<sup>19</sup> For the first step, the Commission in the *Second Report and Order* in MB Docket No. 07-42 directs the Media Bureau to release a decision determining whether the complainant has established a *prima facie* case within 60 calendar days after the complainant’s reply to the defendant’s answer is filed (or the date on which the reply would be due if none is filed).<sup>20</sup> For the second step, the Commission imposes different deadlines for a ruling on the merits of the complaint depending upon whether the adjudicator is the Media Bureau or the ALJ.<sup>21</sup> After the Media Bureau concludes that the complaint contains sufficient evidence to establish a *prima facie* case, the Media Bureau has three options for addressing the merits of the complaint: (i) the Media Bureau can rule on the merits of the complaint based on the pleadings without discovery; (ii) if the Media Bureau determines that the record is not sufficient to resolve the complaint, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint; or (iii) if the Media Bureau determines that disposition of the complaint or discrete issues raised in the complaint requires resolution of factual disputes or other extensive discovery in an adjudicatory proceeding, the Media Bureau will refer the proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ.<sup>22</sup> The Commission in the *Second Report and Order* in MB Docket No. 07-42 establishes the following deadlines for the adjudicator’s decision on the merits. For complaints that the Media Bureau decides on the merits based on the pleadings without discovery, the Media Bureau must release a decision within 60 calendar days after its *prima facie* determination.<sup>23</sup> For complaints that the Media Bureau decides on the merits after discovery, the Media Bureau must release a decision within 150 calendar days after its *prima facie* determination.<sup>24</sup> For complaints referred to an ALJ for a decision on the merits, the ALJ must release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue Alternative Dispute Resolution (“ADR”) or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR.<sup>25</sup> In adopting this deadline for program carriage complaints referred to an ALJ, the *Second Report and Order* in MB Docket No. 07-42 also adopts revised procedural deadlines applicable to adjudicatory hearings involving program carriage complaints.<sup>26</sup> The deadlines for the Media Bureau or an ALJ to reach a decision may be tolled only under the following circumstances: (i) if the parties jointly request tolling in order to pursue settlement discussions or ADR or for any other reason that the parties mutually agree justifies tolling; or (ii) if complying with the deadline would violate the due process rights

<sup>18</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 19-24.

<sup>19</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 20.

<sup>20</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 20.

<sup>21</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

<sup>22</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

<sup>23</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

<sup>24</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

<sup>25</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

<sup>26</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 22.

of a party or would be inconsistent with fundamental fairness.<sup>27</sup> In addition, in extraordinary situations, the ALJ may toll the deadline for reaching a decision due to a lack of adjudicatory resources available at the time in the Office of Administrative Law Judges.<sup>28</sup>

6. Fourth, in response to concerns that MVPDs have the ability to retaliate against a programming vendor that files a program carriage complaint by ceasing carriage of the programming vendor's video programming, the Commission in the *Second Report and Order* in MB Docket No. 07-42 establishes procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.<sup>29</sup> Pursuant to these procedures, a program carriage complainant seeking renewal of an existing programming contract may submit along with its complaint a petition for a temporary standstill of its programming contract pending resolution of the complaint.<sup>30</sup> The Commission encourages complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract, and in no case later than 30 days prior to such expiration, to provide the Media Bureau with sufficient time to act prior to expiration.<sup>31</sup> In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.<sup>32</sup> The defendant will have ten calendar days after service to file an answer to the petition for a standstill order.<sup>33</sup> If the Media Bureau grants the temporary standstill, the adjudicator ruling on the merits of the complaint (*i.e.*, either the Media Bureau or an ALJ) will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.<sup>34</sup>

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

7. There were no comments filed specifically in response to the IRFA.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>35</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>36</sup> In addition, the term "small business" has the

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<sup>27</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 23.

<sup>28</sup> See *id.*

<sup>29</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 25-30.

<sup>30</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

<sup>31</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

<sup>32</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

<sup>33</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

<sup>34</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 28-29.

<sup>35</sup> 5 U.S.C. § 603(b)(3).

<sup>36</sup> 5 U.S.C. § 601(6).

same meaning as the term “small business concern” under the Small Business Act.<sup>37</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>38</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

9. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>39</sup> The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”<sup>40</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>41</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>42</sup>

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.<sup>43</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000

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<sup>37</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>38</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>39</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>40</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>41</sup> See *id.*

<sup>42</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>43</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>44</sup>

11. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>45</sup> Industry data indicate that all but ten cable operators nationwide are small under this size standard.<sup>46</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>47</sup> Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.<sup>48</sup> Thus, under this standard, most cable systems are small.

12. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>49</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>50</sup> Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.<sup>51</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>52</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

13. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic

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<sup>44</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>45</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>46</sup> See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

<sup>47</sup> 47 C.F.R. § 76.901(c).

<sup>48</sup> See TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

<sup>49</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>50</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>51</sup> See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

<sup>52</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

census category, “Wired Telecommunications Carriers,”<sup>53</sup> which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>54</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>55</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).<sup>56</sup> Each currently offers subscription services. DIRECTV<sup>57</sup> and EchoStar<sup>58</sup> each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

14. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”<sup>59</sup> which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>60</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>61</sup>

15. *Home Satellite Dish (“HSD”) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses

<sup>53</sup> See 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 8, above.

<sup>54</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>55</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>56</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

<sup>57</sup> As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See *13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

<sup>58</sup> As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.*

<sup>59</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>60</sup> See *id.*

<sup>61</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>62</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>63</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>64</sup>

16. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).<sup>65</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>66</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>67</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>68</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not

<sup>62</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>63</sup> See *id.*

<sup>64</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>65</sup> *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>66</sup> 47 C.F.R. § 21.961(b)(1).

<sup>67</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

<sup>68</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>69</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>70</sup> Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

17. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>71</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>72</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>73</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>74</sup>

18. *Fixed Microwave Services.* Microwave services include common carrier,<sup>75</sup> private-operational fixed,<sup>76</sup> and broadcast auxiliary radio services.<sup>77</sup> They also include the Local Multipoint Distribution Service (LMDS),<sup>78</sup> the Digital Electronic Message Service (DEMS),<sup>79</sup> and the 24 GHz

<sup>69</sup> *Id.* at 8296.

<sup>70</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

<sup>71</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

<sup>72</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), [www.census.gov/naics/2007/def/ND517110.HTM#N517110](http://www.census.gov/naics/2007/def/ND517110.HTM#N517110).

<sup>73</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>74</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>75</sup> See 47 C.F.R. Part 101, Subparts C and I.

<sup>76</sup> See 47 C.F.R. Part 101, Subparts C and H.

<sup>77</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

<sup>78</sup> See 47 C.F.R. Part 101, Subpart L.

Service,<sup>80</sup> where licensees can choose between common carrier and non-common carrier status.<sup>81</sup> At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons.<sup>82</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>83</sup> For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>84</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

19. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>85</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>86</sup> OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."<sup>87</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>88</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>89</sup> In addition, we note that the

(...continued from previous page)

<sup>79</sup> See 47 C.F.R. Part 101, Subpart G.

<sup>80</sup> See *id.*

<sup>81</sup> See 47 C.F.R. §§ 101.533, 101.1017.

<sup>82</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517210.

<sup>83</sup> See *id.* The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>84</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=700&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en).

<sup>85</sup> 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

<sup>86</sup> See 47 U.S.C. § 573.

<sup>87</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>88</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>89</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).



Commission has certified some OVS operators, with some now providing service.<sup>90</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>91</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

20. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>92</sup> The SBA has developed a small business size standard for this category, which is: all such firms having \$15 million dollars or less in annual revenues.<sup>93</sup> To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.<sup>94</sup> Of that number, 325 operated with annual revenues of \$ 9,999,999 million dollars or less.<sup>95</sup> Seventy-one (71) operated with annual revenues of between \$10 million and \$100 million or more.<sup>96</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

21. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>97</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>98</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

<sup>90</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsцер.html>.

<sup>91</sup> See *13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>92</sup> U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

<sup>93</sup> 13 C.F.R. § 121.201, 2007 NAICS code 515210.

<sup>94</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-skip=700&-ds\\_name=EC0751SSSZ4&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=700&-ds_name=EC0751SSSZ4&-lang=en)

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 15 U.S.C. § 632.

<sup>98</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

22. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>99</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>100</sup>

23. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>101</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>102</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

24. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.<sup>103</sup> Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."<sup>104</sup> The Commission has estimated the number of licensed commercial television stations to be 1,390.<sup>105</sup> According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of

<sup>99</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>100</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>101</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>102</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>103</sup> See 13 C.F.R. § 121.201, 2007 NAICS Code 515120.

<sup>104</sup> U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting"; <http://www.census.gov/naics/2007/def/ND515120.HTM>. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>105</sup> See News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0211/DOC-304594A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf).

April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations<sup>106</sup> (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 391.<sup>107</sup> We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>108</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

25. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

26. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>109</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.<sup>110</sup> To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.<sup>111</sup> Of these, 8995 had annual receipts of \$24,999,999 or less, and 100 has annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.<sup>112</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

27. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and

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<sup>106</sup> We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 105; however, we are using BIA’s estimate for purposes of this revenue comparison.

<sup>107</sup> See *Broadcast Station Totals*, *supra*, note 105.

<sup>108</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>109</sup> U.S. Census Bureau, 2007 NAICS Definitions, “51211 Motion Picture and Video Production”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211>.

<sup>110</sup> 13 C.F.R. § 121.201, 2007 NAICS code 512110.

<sup>111</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=200&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=200&-ds_name=EC0751SSSZ5&-lang=en)

<sup>112</sup> *Id.*

distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”<sup>113</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.<sup>114</sup> To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.<sup>115</sup> Of these, 434 had annual receipts of \$24,999,999 or less, and 16 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.<sup>116</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

28. The rules adopted in the *Second Report and Order* in MB Docket No. 07-42 will impose additional reporting, recordkeeping, and compliance requirements on video programming vendors and MVPDs. First, the *Second Report and Order* in MB Docket No. 07-42 clarifies what evidence a complainant must provide in its program carriage complaint in order to establish a *prima facie* case of a program carriage violation.<sup>117</sup> Second, to enable the defendant to develop a full, case-specific response to the evidence put forth by the complainant, with supporting evidence, the *Second Report and Order* in MB Docket No. 07-42 provides the defendant with 60 days (rather than the current 30 days) to answer the complaint.<sup>118</sup> Third, in adopting a deadline for an ALJ to issue a decision on the merits of a program carriage complaint referred by Media Bureau, the *Second Report and Order* in MB Docket No. 07-42 adopts revised procedural deadlines applicable to adjudicatory hearings involving program carriage complaints.<sup>119</sup> Fourth, the *Second Report and Order* in MB Docket No. 07-42 establishes procedures for the Commission’s consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.<sup>120</sup>

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account

<sup>113</sup> See U.S. Census Bureau, 2007 NAICS Definitions, “51212 Motion Picture and Video Distribution”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212>.

<sup>114</sup> 13 C.F.R. § 121.201, 2007 NAICS code 512120.

<sup>115</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-skip=200&-ds\\_name=EC0751SSSZ4&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=200&-ds_name=EC0751SSSZ4&-lang=en)

<sup>116</sup> *Id.*

<sup>117</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 9-17.

<sup>118</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶ 18.

<sup>119</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 19-24.

<sup>120</sup> See *Second Report and Order* in MB Docket No. 07-42 at ¶¶ 25-30.

the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>121</sup> The *Program Carriage NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.<sup>122</sup>

30. As discussed in Section A, the *Second Report and Order* in MB Docket No. 07-42 is intended to improve the Commission's procedures for addressing program carriage complaints. By clarifying the evidence a complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, providing defendants with additional time to answer a complaint, establishing deadlines for action on program carriage complaints, and establishing procedures for requesting a standstill of an existing programming contract, the decision confers benefits upon both video programming vendors and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the decision benefits smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary.

#### F. Report to Congress

31. The Commission will send a copy of the *Second Report and Order* in MB Docket No. 07-42, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>123</sup> In addition, the Commission will send a copy of the *Second Report and Order* in MB Docket No. 07-42, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* in MB Docket No. 07-42 and FRFA (or summaries thereof) will also be published in the *Federal Register*.<sup>124</sup>

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<sup>121</sup> 5 U.S.C. § 603(c)(1)-(c)(4)

<sup>122</sup> See *Program Carriage NPRM*, 22 FCC Rcd at 11231-11240, Appendix.

<sup>123</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>124</sup> See 5 U.S.C. § 604(b).

## APPENDIX G

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking in MB Docket No. 11-131 (“NPRM”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act<sup>4</sup> pertaining to carriage of video programming vendors by multichannel video programming distributors (“MVPDs”). These rules are intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the “program carriage” rules).<sup>5</sup> As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor’s program service as a condition for carriage (the “financial interest” provision);<sup>6</sup> (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage (the “exclusivity” provision);<sup>7</sup> or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage (the “discrimination” provision).<sup>8</sup> Congress specifically directed the Commission to provide for “expedited review” of these complaints and to provide for appropriate penalties and remedies for any violations.<sup>9</sup> Programming vendors have complained that the Commission’s procedures for addressing program

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“1992 Cable Act”); see also 47 U.S.C. § 536.

<sup>5</sup> See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, *Second Report and Order*, 9 FCC Rcd 2642 (1993) (“1993 Program Carriage Order”); see also *Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) (“1994 Program Carriage Order”). The Commission’s program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

<sup>6</sup> See 47 C.F.R. § 76.1301(a); see also 47 U.S.C. § 536(a)(1).

<sup>7</sup> See 47 C.F.R. § 76.1301(b); see also 47 U.S.C. § 536(a)(2).

<sup>8</sup> See 47 C.F.R. § 76.1301(c); see also 47 U.S.C. § 536(a)(3).

<sup>9</sup> See 47 U.S.C. § 536(a)(4).

carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by Congress.

3. The *NPRM* seeks comment on a series of proposals to revise or clarify the Commission's program carriage rules intended to improve the Commission's procedures for handling program carriage complaints and to further the goals of the program carriage statute. The *NPRM* seeks comment on the following:

- Modifying the program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the rules;<sup>10</sup>
- Revising discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery is conducted, including expanded discovery procedures (also known as party-to-party discovery) and an automatic document production process, to ensure fairness to all parties while also ensuring compliance with the expedited resolution deadlines adopted in the *Second Report and Order* in MB Docket No. 07-42;<sup>11</sup>
- Permitting the award of damages in program carriage cases;<sup>12</sup>
- Providing the Media Bureau or ALJ with the discretion to order parties to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint proceeding to assist in crafting a remedy;<sup>13</sup>
- Clarifying the rule that delays the effectiveness of a mandatory carriage remedy until it is upheld by the Commission on review, including codifying a requirement that the defendant MVPD must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming;<sup>14</sup>
- Codifying in our rules that retaliation by an MVPD against a programming vendor for filing a program carriage complaint is actionable as a potential form of discrimination on the basis of affiliation and adopting other measures to address retaliation;<sup>15</sup>
- Adopting a rule that requires a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD;<sup>16</sup>
- Clarifying that the discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD;<sup>17</sup> and

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<sup>10</sup> See *NPRM* at ¶¶ 38-40.

<sup>11</sup> See *id.* at ¶¶ 41-49.

<sup>12</sup> See *id.* at ¶¶ 50-53.

<sup>13</sup> See *id.* at ¶¶ 54-55.

<sup>14</sup> See *id.* at ¶¶ 56-59.

<sup>15</sup> See *id.* at ¶¶ 60-67.

<sup>16</sup> See *id.* at ¶¶ 68-71.

<sup>17</sup> See *id.* at ¶¶ 72-78.

- Codifying in our rules which party bears the burden of proof in program carriage discrimination cases after the complainant has established a *prima facie* case.<sup>18</sup>

The *NPRM* also invites commenters to suggest any other changes to the program carriage rules that would improve the Commission's procedures and promote the goals of the program carriage statute.<sup>19</sup>

**B. Legal Basis**

4. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>20</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>21</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>22</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>23</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."<sup>24</sup> The SBA has developed a small

<sup>18</sup> See *id.* at ¶¶ 79-81.

<sup>19</sup> See *id.* at ¶ 37.

<sup>20</sup> 5 U.S.C. § 603(b)(3).

<sup>21</sup> 5 U.S.C. § 601(6).

<sup>22</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>23</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

<sup>24</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.



business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”<sup>25</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>26</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>27</sup>

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.<sup>28</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>29</sup>

8. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>30</sup> Industry data indicate that all but ten cable operators nationwide are small under this size standard.<sup>31</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>32</sup> Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.<sup>33</sup> Thus, under this standard, most cable systems are small.

9. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>34</sup> The Commission has determined that an operator serving fewer than 677,000

<sup>25</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>26</sup> See *id.*

<sup>27</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>28</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>29</sup> See [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-skip=600&-ds\\_name=EC0751SSSZ5&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en).

<sup>30</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>31</sup> See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

<sup>32</sup> 47 C.F.R. § 76.901(c).

<sup>33</sup> See TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

<sup>34</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.